STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 19, 2007
v	No. 268941 Oakland Circuit Court
WAYNE MICHAEL KENNEDY, Defendant-Appellant.	LC No. 05-201108-FH

Before: Meter, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for child sexually abusive activity, MCL 750.145c(2), communicating with another on the Internet to commit a felony, MCL 750.145d(2)(f) (child sexually abusive activity), and communicating with another on the Internet to commit a felony, MCL 750.145d(2)(c) (disseminating sexually explicit matter to a minor). Defendant received concurrent sentences of 30 to 240 months' imprisonment for the child sexually abusive activity conviction, 30 to 240 months' imprisonment for communicating with another on the Internet to commit child sexually abusive activity, and 18 to 36 months' imprisonment for communicating with another on the Internet to disseminate sexually explicit matter to a minor. We affirm.

I. Facts

Special Agent Michael Ondejko of the Michigan Attorney General's "High Tech Crime Unit" was conducting an online investigation in December 2004. Ondejko, acting undercover, used a persona called "pretty_eye_kac14," a 14-year-old girl named Kelli. On the profile, Ondejko posted photographs depicting a young girl, a cat, a guitar, and a midriff with a pierced navel. On December 29, 2004, a person with the screen name "Kennedy005" contacted "Kelli" in a chat room entitled "Michigan Romance." Kennedy005 sent an instant message to "Kelli," and they exchanged messages for approximately one hour. Kennedy005 shared images of himself through a "webcam," a video camera used to send periodic frames or continuous images over the Internet. They shared sexual experiences and discussed possible future sexual encounters. From a photograph taken from the webcam video, Ondejko identified defendant as Kennedy005 at trial. Defendant asked if "Kelli" would like to see that he was "excited," and "she" agreed. Defendant undid his pants, exposed himself, and proceeded to masturbate in front of the camera. Defendant ejaculated in front of the camera and signed off the instant messenger service.

On January 5, 2005, Ondejko, still posing as "Kelli," communicated with defendant through the instant messaging service, and they exchanged messages for an hour. They discussed meeting in person and potential future sexual encounters, including defendant performing oral sex on "Kelli," and defendant asked if there was somewhere they could meet the following day. "Kelli" suggested meeting at a Blockbuster video store in Ferndale, Michigan, and defendant agreed. On January 6, 2005, "Kelli" and defendant exchanged several electronic mail ("e-mail") messages to finalize their meeting arrangements. Because defendant expressed some concern about being seen together at a hotel or getting caught by police, he and "Kelli" planned to meet at the video store and go somewhere to have a sexual encounter in his car. Ondejko arrived at the video store in Ferndale and saw defendant pull into the parking lot, where he was arrested.

II. Venue

First, defendant argues that the trial court erred in determining that venue was proper in Oakland County. We disagree. We review de novo a trial court's determination regarding the existence of venue in a criminal prosecution. *People v Webbs*, 263 Mich App 531, 533; 689 NW2d 163 (2004).

"Venue is a part of every criminal prosecution and must be proved by the prosecutor beyond a reasonable doubt." *Id.* Generally, defendants must be tried in the county where the offense was committed. *People v Jendrzejewski*, 455 Mich 495, 499; 566 NW2d 530 (1997). However, when a felony consists of or culminates in more than one act done in the perpetration thereof, the crime may be prosecuted in any county where any of the acts were committed. MCL 762.8; *Webbs*, *supra* at 533. This section has been interpreted broadly so that the place where an act is considered to have been committed is not merely the place where the defendant is physically present. *Id.* at 534-535; *People v Fisher*, 220 Mich App 133, 151-152; 559 NW2d 318 (1996). Rather, venue may be proper in a county where the "effects" of the essential acts committed in furtherance of the offense were felt or suffered. *Webbs*, *supra* at 535; *Fisher*, *supra* at 152. Although the *Webbs* Court opined that the *Fisher* Court's reasoning did not comport with the plain language of MCL 762.8, it did not overrule *Fisher*, but merely distinguished *Fisher* on the facts and found that the effects of the defendant's acts were not essential to the offense. *Webbs*, *supra* at 536. Thus, we are bound by the decision of the *Fisher* Court. See MCR 7.215(C)(2), (J)(1).

Defendant was convicted of violating MCL 750.145d, which provides that a person shall not use the Internet or a computer to communicate with another person for the purpose of committing the conduct proscribed in MCL 750.145c. Defendant was also convicted of violating MCL 750.145c, which prohibits arranging for or attempting or preparing to arrange for, any child sexually abusive activity. Ondejko, posing as "Kelli," conducted the online communication from his office in Livonia, which is in Wayne County. Defendant used a computer to communicate with "Kelli" from his residence in Clinton Township and his place of employment in Warren, both of which are located in Macomb County. Defendant arranged to meet "Kelli" at a video store in Ferndale, which is located in Oakland County, and he was arrested at that location.

In this case, defendant arranged for child sexually abusive activity to occur in Oakland County. Although defendant is technically correct that his offenses were completed before he

left Macomb County, his act of arranging, i.e., planning, for a sexual encounter was intended to affect the welfare and well-being of a perceived minor in Oakland County. The act of arranging for a sexual encounter with a perceived child is essential to the offense of child sexually abusive activity. *People v Thousand*, 241 Mich App 102, 114-117; 614 NW2d 674 (2000), rev'd in part on other grounds 465 Mich 149 (2001). Therefore, we are not persuaded that *Fisher* is distinguishable and find that the trial court did not err in determining that venue was proper in Oakland County. Because defendant's charge of communicating with another on the Internet to commit child sexually abusive activity was based on his child sexually abusive activity charge, venue was also appropriate in Oakland County with respect to the communicating with another on the Internet charge. An information may charge a defendant with more than one offense. MCR 6.120. Because defendant's charge of communicating with another on the Internet to disseminate sexually explicit matter to a minor was related to the other charges, we do not vacate any of his convictions on this ground.

III. Sufficiency of the Evidence

Next, defendant claims that the prosecution presented insufficient evidence to sustain his child sexually abusive activity conviction because MCL 750.145c only addresses child pornography. Defendant further contends that the prosecution presented insufficient evidence to support his conviction for communicating with another on the Internet to commit child sexually abusive activity because it was based on his child sexually abusive activity conviction. We disagree. When the sufficiency of the evidence is challenged, we review the evidence "in a light most favorable to the prosecutor to determine whether any trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). We review questions of statutory interpretation de novo. *People v Anstey*, 476 Mich 436, 442; 719 NW2d 579 (2006).

The child sexually abusive activity statute, MCL 750.145c(2), provides as follows:

> A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material, *or a person who arranges for, produces, makes, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make, or finance any child sexually abusive activity* or child sexually abusive material is guilty of a felony, punishable by imprisonment for not more than 20 years, or a fine of not more than $100,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child. [Emphasis added.]

The primary goal in statutory construction is to give effect to the intent of the Legislature, and we begin by examining the statute's plain language. *Anstey*, *supra* at 442-443. If the plain language of the statute is clear and unambiguous, no further construction is necessary, and we enforce the statute as written. *People v Chavis*, 468 Mich 84, 92; 658 NW2d 469 (2003). As this Court observed in *People v Adkins*, 272 Mich App 37, 40; 724 NW2d 710 (2006), MCL 750.145c(1)(l) defines "child sexually abusive activity" as "a child engaging in a listed

sexual act." A "listed sexual act" means "sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity." MCL 750.145c(1)(h). "Sexual intercourse" includes oral-genital and oral-anal intercourse. MCL 750.145c(1)(p).

This Court stated in *Adkins, supra* at 40, MCL 750.145c(2) applies to three distinct groups of persons. *Adkins, supra* at 40. A member of the first category of liable persons is one "who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material[.]" MCL 750.145c(2); *Adkins, supra* at 40-41. This group of persons is likely the one to whom defendant refers, i.e., those who are engaged in the production of pornography. The second group of persons is defined by a member who "arranges for, produces, makes, or finances . . . any child sexually abusive activity or child sexually abusive material[.]" MCL 750.145c(2); *Adkins, supra* at 41. The last group of persons is defined by a member "who attempts or prepares or conspires to arrange for, produce, make, or finance any child sexually abusive activity or child sexually abusive material[.]" MCL 750.145c(2); *Adkins, supra* at 41. The use of the disjunctive "or" in the second and third groups clearly and unambiguously indicates that persons who arrange for or attempt or prepare to arrange for child sexually abusive activity face criminal liability. See *Adkins, supra* at 41. Because the plain language of MCL 750.145c is clear and unambiguous, we may not consider the legislative history presented by defendant. *Chavis, supra* at 92. Therefore, defendant's argument that MCL 750.145c only applies to pornography is unpersuasive.

Although defendant argues that *Adkins* was wrongly decided, we are bound by that decision. See MCR 7.215(C)(2), (J)(1). On December 29, 2004, defendant asked "Kelli" her age, and "Kelli" informed him that "she" was 14. On January 5, 2005, and January 6, 2005, defendant discussed performing oral sex on "Kelli" and made arrangements to meet "Kelli" for this purpose. Oral sex constitutes "sexual intercourse," which is a "listed sexual act" and therefore constitutes "child sexually abusive activity." MCL 750.145c(1)(h), (l), (p). Accordingly, after reviewing the evidence in a light most favorable to the prosecutor, we determine that any trier of fact could find that the essential elements of the crime of child sexually abusive activity were established beyond a reasonable doubt. See *Robinson, supra* at 5. Given our resolution of this issue, we need not consider defendant's argument regarding the sufficiency of the evidence supporting his conviction for communicating with another on the Internet to commit a felony.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Donald S. Owens